

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1368
STATE OF WISCONSIN**

Cir. Ct. No. 2006FA925

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

KEVIN E. MELAHN,

JOINT-PETITIONER-APPELLANT,

V.

JESSICA M. MELAHN N/K/A JESSICA M. CARLSON,

JOINT-PETITIONER-RESPONDENT.

APPEAL from an order of the circuit court for Rock County:
BARBARA W. McCRORY, Judge. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Kevin Melahn appeals an order dismissing his motion for change of placement of his two daughters. Because the circuit court correctly concluded that the motion does not establish a substantial change of circumstances, we affirm the order.

¶2 A change of placement requires a showing of a substantial change of circumstances. WIS. STAT. § 767.451(1)(b) (2011-12).¹ A substantial change of circumstances is a change “such that it would be unjust or inequitable to strictly hold either party to the original judgment.” *Lofthus v. Lofthus*, 2004 WI App 65, ¶17, 270 Wis. 2d 515, 678 N.W.2d 393. Whether there is a substantial change in circumstances is a mixed question of law and fact. *Rosplock v. Rosplock*, 217 Wis. 2d 22, 32-33, 577 N.W.2d 32 (Ct. App. 1998). The circuit court’s finding of whether a change has occurred will not be disturbed unless it is clearly erroneous. *Lofthus*, 270 Wis. 2d 515, ¶17. Whether the change is substantial is a question of law that we decide de novo. *Greene v. Hahn*, 2004 WI App 214, ¶23, 277 Wis. 2d 473, 689 N.W.2d 657.

¶3 Kevin identifies five changes since the 2009 stipulation and order regarding placement that he contends constitute a substantial change of circumstances. First, he has a new job, reducing the number of hours he works each day and making him more available for the children. However, as the circuit court noted, he has consistently worked the day shift and his current work schedule is “basically the same as it was back in 2009.” In 2009, Kevin worked ten-hour days from 7:30 a.m. to 5:30 p.m. and “sometimes” until 9:00 p.m. He also delivered pizzas at night. In 2013, he worked at his new job from 8:00 a.m. to 4:30 p.m., and still delivered pizzas one or two nights per week. These changes in Kevin’s working hours do not constitute a substantial change of circumstances.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Kevin contends that his current working hours are more comparable to the hours he worked at the time of the initial divorce judgment in 2007. He argues that if the changes in his working hours at the time of the 2009 stipulation and order constituted a substantial change of circumstances, returning to work hours that existed in 2007 should also constitute a substantial change of circumstances. That argument fails to recognize the dynamic nature of placement decisions. The court does not apply such a mechanical approach to placement decisions.

¶5 Kevin's second identified change of circumstances is that the children are older and participate in additional activities. A child getting older does not ordinarily create a substantial change in circumstances. *Id.*, ¶25. The court found that the children were not involved in many activities outside of school or in activities that interfered with Kevin's placement time. His daughters' participation in Girl Scouts and gymnastics might impact the time Kevin can spend with them, but he decides whether they can attend extra-curricular meetings and functions. In addition, he has gone on field trips and participated in the activities. The children's participation in activities outside of school are not so great as to constitute a substantial change of circumstances.

¶6 Kevin's third identified change of circumstances is that Jessica now cohabitates with her fiancé. Jessica testified she had been living with her fiancé since 2007, almost two years before the 2009 stipulation and order. Kevin testified he was not aware of that situation. The circuit court found Kevin's testimony not credible. Therefore, there has been no change in Jessica's living arrangement since the 2009 order.

¶7 Kevin next argues that Jessica’s pregnancy and delivery of another child constitute a substantial change in circumstances. Jessica was pregnant when she signed the 2009 stipulation. The birth of her son had no apparent effect on the parties’ daughters. They were doing well in school and had no attendance issues. An addition to the family is not so unusual as to constitute a substantial change of circumstances.

¶8 Finally, Kevin argues that problems with cooperation and communication between the parties constitute a substantial change of circumstances. While Kevin identifies specific instances where cooperation and communication could have been better, episodic difficulties of that nature do not constitute a substantial change of circumstances. Taken collectively, the five changes identified by Kevin do not constitute a substantial change of circumstances that would justify modification of the placement order.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

